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Obviousness of Product Dangers as a Bar to Recovery: Minnesota Apparently Adopts the Latent-Patent Doctrine [Halvorson v. American Hoist & Derrick Co., ____ Minn. ____, 240 N.W.2d 303 (1976)]

OBVIOUSNESS OF PRODUCT DANGERS AS A BAR TO RECOVERY: MINNESOTA APPARENTLY ADOPTS THE LATENT-PATENT DOCTRINE

[*Halvorson v. American Hoist & Derrick Co.*, ___ Minn. ___, 240 N.W.2d 303 (1976)].

I. INTRODUCTION

Since the turn of this century, the liability of manufacturers for product-related injuries has seen a fundamental change.[1] The barriers of privity,[2] notice,[3] and disclaimer[4] have been removed; the affirmative defenses of contributory negligence and assumption of risk have been shifted from barring recovery to factors mitigating recovery;[5] and manufacturers' liability has developed from complete exculpation of the man-

1. For a discussion of the development of manufacturers' liability to consumers for defective products, see James, *Products Liability* (2 pts.), 34 TEX. L. REV. 45, 192 (1955); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall*]; Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965). Commencing with the original rule of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842) that there could be no liability without privity, these articles trace the development of manufacturers' liability through four major progressive stages of increased liability: (1) liability for impure foods; (2) liability for products judicially determined to be inherently dangerous; (3) liability for negligence in the manufacture of products; and (4) strict liability in tort under the American Law Institute's RESTATEMENT (SECOND) OF TORTS § 402A (1965).

2. Since the landmark case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the necessity of privity between the manufacturer and remote buyer generally has been abolished as a requisite to plaintiffs' recovery. This abrogation of privity was foreseen in Minnesota in Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959), where the court recognized the problems caused by continued adherence to the privity requirement. For a good discussion of this area, see Prosser, *The Fall*, *supra* note 1, at 791.

3. Reasonable notice is a viable concept under the U.C.C. § 2-607(3) (1972 version) when applied in a commercial context, since it protects the seller from unduly delayed claims. However, significant case law has developed obviating the necessity of notice in personal injury cases. *See* Prosser, *The Fall*, *supra* note 1, at 829.

4. When the privity requirement was vitiated, the disclaimer defense became the next best vehicle for manufacturers to protect themselves from liability. This approach, however, generally has been rejected by courts adopting a strict liability theory of recovery. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964); Prosser, *The Fall*, *supra* note 1, at 831.

5. *See, e.g.*, Springrose v. Willmore, 292 Minn. 23, 26, 192 N.W.2d 826, 828 (1971) (assumption of risk reduces recovery under Minnesota's comparative negligence statute for all actions arising after December 10, 1971). The applicability of comparative negligence statutes to strict products liability actions, however, is uncertain. *See generally* Note, *A Reappraisal of Contributory Fault in Strict Products Liability Law*, 2 WM. MITCHELL L. REV. 235 (1976).

ufacturer to strict liability for product defects.[6]

Precipitating this shift has been a change in the underlying rationale of products liability law.[7] Today, producers of goods for general usage are looked upon as the centralized point in the distribution chain, where preventive measures necessary for the protection of the consumer can most effectively be accomplished,[8] and where the costs of product-related injuries can most efficiently be borne.[9] The emphasis of these policy considerations is on preventing injuries through research, safety

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6. Since its adoption in the leading case of Greenman v. Yuba Power Prods.,Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), strict liability for product defects has been recognized in at least 38 jurisdictions. See 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4.41 (2d ed. 1974 & Supp. 1976). The doctrine was recognized in Minnesota in McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) and first applied in Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969). Most courts adopting the theory of strict liability in tort for product defects have relied upon the American Law Institute's RESTATEMENT (SECOND) OF TORTS § 402A (1965), which provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

7. *Compare* Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842) (court protected manufacturer through contractual privity requirement because it feared unlimited liability would otherwise result) *with* McCormack v. Hankscraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967) (court reasoned the manufacturer's liability should be increased and costs of injuries should be absorbed by manufacturer of defective products as necessary expense of doing business).

8. *See, e.g.*, 35 MINN. L. REV. 608, 609 (1950). The responsibility of the manufacturer to provide feasible safety precautions is represented by recent decisions where manufacturers were required to provide safety devices to prevent industrial machine operators from suffering injury because of momentary inadvertance. *See, e.g.*, Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972), *noted in* 86 HARV. L. REV. 923 (1973).

9. *See, e.g.*, McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967). In discussing the rationale for strict liability under the RESTATEMENT (SECOND) OF TORTS § 402A (1965), the *McCormack* court stated:

> [S]ubjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

278 Minn. at 338, 154 N.W.2d at 500.

devices, and adequate warnings, with the expenses of these endeavors being absorbed by the manufacturers, and ultimately by the consumers, either through the costing of the products or through insurance.[10]

Contrasted with this inexorable move toward greater responsibility on manufacturers is the latent-patent rule, often termed the *Campo* doctrine.[11] This rule, which relieves the producer from liability if the dangers of the product are obvious to the user, has had a retarding effect on the development of modern tort theories of manufacturers' liability.[12] In 1976, the Minnesota Supreme Court apparently adopted the latent-patent rule in *Halvorson v. American Hoist & Derrick Co.*,[13] thereby establishing a precedent in Minnesota which could have a severe impact on plaintiffs' ability to recover for personal injuries caused by dangerous products.[14]

In *Halvorson,* the plaintiff was a construction worker assisting in surfacing a rural highway.[15] He grasped a portable cement leveler to steady it while it was being lowered into place by an overhead crane, and as he did so the boom cable of the crane contacted a 7,000 volt uninsulated electrical power line.[16] The electricity was transmitted down the cable, through the leveler, and into the plaintiff, seriously injuring him.[17] Suit was initiated against the American Hoist and Derrick Company, manufacturer of the crane, based on strict products liability and negligence.[18] The plaintiff alleged defective design because the crane was not equipped with a proximity warning buzzer for electrical sources or with an insulating hook to prevent transmission of electricity down the boom cable.[19]

The trial court entered judgment against the manufacturer for the full amount of the jury verdict,[20] but the Minnesota Supreme Court reversed, holding the manufacturer owed the plaintiff no duty to install safety devices or to guard against the risk of electrocution.[21] The court

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10. See note 9 *supra.*

11. The doctrine was first articulated by the New York Court of Appeals in Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), *overruled,* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

12. *See* notes 56-94 *infra* and accompanying text.

13. ___ Minn. ___, 240 N.W.2d 303 (1976).

14. *See* notes 95-158 *infra* and accompanying text.

15. ___ Minn. at ___, 240 N.W.2d at 304.

16. *Id.* Although the operation was being supervised by the defendant employer's foreman, no member of the road crew was observing the positioning of the crane boom in relation to the power lines. *Id.* at ___, 240 N.W.2d at 305.

17. *Id.* at ___, 240 N.W.2d at 304-05.

18. *Id.*

19. *Id.*

20. *Id.* at ___, 240 N.W.2d at 306.

21. *Id.* at ___, 240 N.W.2d at 308. The supreme court made this determination as a matter of law, indicating the obviousness question is one for the court, not the jury, in

supported its holding by reasoning that the risk of injury was obvious, known to all employees involved, and specifically warned against in the crane manufacturer's operating instructions.[22] Citing the leading latent-patent case, *Campo v. Scofield,*[23] the *Halvorson* court concluded the plaintiff, as a matter of law, could not recover for defective product design because the danger was obvious.[24]

Adoption of the latent-patent rule fundamentally alters the treatment of plaintiffs' awareness of dangerous defects in products liability law.[25] In essence, under the *Campo* doctrine, the plaintiff has the burden of establishing lack of awareness and, if he is unsuccessful, recovery is absolutely barred.[26] This creates an acute problem in a jurisdiction, such

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Minnesota. *See* Lambertson v. Cincinnati Corp., Fin. & Commerce, Feb. 4, 1977, at 5, col. 1 (Minn. Feb. 4, 1977).

22. ___ Minn. at ___, 240 N.W.2d at 308.

23. 301 N.Y. 468, 95 N.E.2d 802 (1950), *overruled,* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

24. The *Halvorson* court also relied upon the RESTATEMENT (SECOND) OF TORTS § 388 (1965), which provides:

> § 388. Chattel Known to be Dangerous for Intended Use.
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Section 388 also was cited and relied upon in Campo v. Scofield, 301 N.Y. 468, 473, 95 N.E.2d 802, 804 (1950). Section 388, however, is not the only RESTATEMENT section relevant in design defect cases. RESTATEMENT (SECOND) OF TORTS § 398 (1965) provides:

> § 398. Chattel Made Under Dangerous Plan or Design.
> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Section 398 therefore suggests that a manufacturer must design its products to make them safe for foreseeable uses, which is in conflict with the *Campo* rule that obvious dangers do not render a product defective. See note 45 *infra* and accompanying text.

25. Most courts and the comments to RESTATEMENT (SECOND) OF TORTS § 402A (1965) recognize three types of plaintiffs' conduct in strict liability situations. These are negligent failure to inspect, assumption of risk, and misuse. *See, e.g.,* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); RESTATEMENT (SECOND) OF TORTS § 402A, comments *h, n* (1965). The latent-patent rule is basically a fourth type of plaintiffs' fault, which has the potential of encompassing the other three. *See* notes 74-94 *infra* and accompanying text.

26. *See* Rheingold, *The Expanding Liability of the Product Supplier: A Primer,* 2

as Minnesota, which allows allocation of liability among the parties through comparative fault analysis.[27] Because of its harsh results, the latent-patent rule has been severely criticized by many courts and commentators.[28] Only weeks after *Halvorson* was decided the New York Court of Appeals abandoned the latent-patent rule which it had established twenty-six years earlier in *Campo.*[29] *Halvorson,* however, can be read as not adopting the traditional latent-patent rule as expressed in *Campo.* Besides obviousness, the court also emphasized that the danger was a matter of common knowledge to the employees and that the manufacturer had warned of the danger in its operating manual.[30] Thus, arguably, a three-part test requiring obviousness, common knowledge of the danger by the relevant group of which the plaintiff is a member, and a specific warning is required to bar recovery under *Halvorson.*[31] The problem with this interpretation of *Halvorson,* however, is that the warning was not designed to reach those employees, such as the plaintiff, who were not operating the crane.[32] The warning was contained in the operator's manual, which presumably was not distributed to all the employees.[33] Consequently, it seems unrealistic to read *Halvorson* as

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HOFSTRA L. REV. 521 (1974) (*Campo* amounts to the finding of assumption of risk as a matter of law).

27. *See* MINN. STAT. § 604.01 (1976) (contributory negligence not a bar to recovery where negligence of individual bringing the action is not as great as defendant's negligence). For a comprehensive list of cases in this area, see C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 3.300 (1971 & Cum. Supp. 1976) [hereinafter cited as HEFT & HEFT, COMPARATIVE NEGLIGENCE].

28. *See, e.g.,* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 7.02 (1976) (citing an exhaustive list of cases on the *Campo* doctrine); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5, at 1543 (1956) [hereinafter cited as HARPER & JAMES].

29. Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

30. The *Halvorson* court stated:

> We hold that American Hoist did not owe this injured plaintiff any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that risk was: (1) obvious; (2) known by all of the employees involved; and (3) specifically warned against in American Hoist's operations manual . . . . The general rule in other jurisdictions is that there is no recovery for negligent design where the danger is obvious. [citation to *Campo* omitted].

___ Minn. at ___, 240 N.W.2d at 308.

31. The court failed to differentiate between the three elements stated as support for the decision and, therefore, it could be implied that all the elements are a prerequisite before the obviousness of a product defect can relieve the manufacturer of liability. *Id.*

32. For a warning to be valid, and therefore adequate to relieve the manufacturer of liability, it must be designed to reach the person who will be exposed to the unreasonable danger. *See* note 70 *infra* and accompanying text. For an excellent discussion of adequacy of warnings, see Noel, *Products Defective Because of Inadequate Directions or Warnings,* 23 SW. L.J. 256 (1969).

33. The only mention made by the court concerning the warning was a quotation from the operator's manual which required that at least a six foot clearance be maintained around high voltage lines. ___ Minn. at ___, 240 N.W.2d at 305. *Compare id. with*

requiring a specific, adequate warning, and the case, at least on its face, appears to rely primarily on the *Campo* doctrine.

Another possible reading of *Halvorson* is that it makes obviousness a bar to plaintiffs' recovery only in those cases where no reasonable safety devices are available to the manufacturer of a socially useful product.[34] The trial transcript indicates that a proximity warning buzzer might not have warned the employees of the impending danger and that the insulating hook might not have effectively stopped the flow of electricity down the boom cable.[35] In addition, these devices were not in common usage in the industry in 1968, but rather were optional devices available at additional cost.[36] Consequently, the *Halvorson* court may have felt compelled to avoid imposing liability on a manufacturer who could not reasonably have made a socially valuable product safe.[37] This reading of *Halvorson,* however, also creates problems, since the court's opinion does not mention the apparent inadequacy of the safety devices and the evidence introduced at trial suggests the safety devices, although not very effective, might have worked.[38]

Although the implications of *Halvorson* are not entirely clear, one cannot escape the conclusion that it seems to adopt the *Campo* latent-

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Skyhook Corp. v. Jasper, ___ N.M. ___, ___, 560 P.2d 934, 936 (1977) (warning, printed on boom of crane, was clearly visible to user as well as bystanders).

34. This interpretation of *Halvorson* is not premised on the language used by the court but rather on a reading of the trial transcript.

35. The testimony of American Hoist and Derrick's consulting engineer revealed that the proximity warning buzzer was not entirely effective. This was because the sensing unit was connected to the crane boom rather than the cable and was, therefore, not necessarily effective when the electrical contact was made with the crane cable. Trial Transcript at 377-80. Additionally, expert testimony established that, in optimum atmospheric conditions, the insulating hooks would prevent 80,000 volts from passing through the hook to a crane load. Trial Transcript at 454. Where moisture was present, either from high humidity or precipitation, dangerous voltages passed through or around the insulating hook thereby rendering it ineffective. Trial Transcript at 454-56.

36. At the time of the *Halvorson* accident, no crane manufacturers installed insulating hooks as standard equipment but they were available at additional expense. The proximity warning buzzer was not offered by any crane manufacturers as either standard or optional equipment at the time of the accident. *See* Skyhook Corp. v. Jasper, ___ N.M. ___, ___, 560 P.2d 934, 936 (1977). The *Halvorson* trial testimony of the defendant crane manufacturer's vice president for engineering revealed that American Hoist and Derrick offered no anti-electrocution safety devices for the crane on which Halvorson was injured. *See* Trial Transcript at 35-36.

37. Such a concern is a valid consideration when deciding whether to impose liability. See note 186 *infra* and accompanying text.

38. The *Halvorson* court's opinion mentions only that there was conflicting testimony and experimental evidence on the effectiveness of the accident prevention devices. ___ Minn. at ___, 240 N.W.2d at 305. These safety devices were, however, recognized and cited in both the Occupational Safety and Health Act and in military safety circulars. *See* Jasper v. Skyhook Corp., 89 N.M. 98, 102-03, 547 P.2d 1140, 1144-45 (Ct. App. 1976), *rev'd*, ___ N.M. ___, 560 P.2d 934 (1977).

patent rule. The court may not have been satisfied with the proof offered on whether the safety devices would have avoided the injury, but its expressed holding appears to be that recovery was barred because the danger was obvious.[39]

This Comment will examine the present status of the latent-patent doctrine in this country, particularly in the design defect context;[40] will discuss the possible repercussions if *Halvorson* is interpreted as adopting the *Campo* doctrine for all products liability cases;[41] and will suggest a more equitable approach to the obviousness issue.[42]

II. THE LATENT-PATENT RULE AND RATIONALE

The latent-patent rule was succinctly stated by the New York Court of Appeals in the 1950 landmark decision of *Campo v. Scofield*,[43] a case where the plaintiff's hands were amputated when they became caught in an onion-topping machine:[44]

> The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes those who use it a duty merely to make it free from latent defects and concealed damages. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users.[45]

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39. The court emphasized that the danger was obvious to the plaintiff and therefore seemed to be adopting a subjective standard. Reference was made to trial testimony of the plaintiff in which he indicated that he realized the danger of the power lines and the injury that could result. ___ Minn. at ___, 240 N.W.2d at 308. The decision on obviousness was made by court as a matter of law, thereby raising the question whether obviousness can be a jury question in Minnesota. *Id.* at ___, 240 N.W.2d at 308.

40. *Halvorson* is illustrative of the most common type of case in which the latent-patent rule is invoked; the products liability design defect case. These cases are classified into three basic categories: those involving concealed dangers; those involving failure to provide necessary safety devices; and those where inadequate materials are used. *See* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 820-29 (1962) [hereinafter cited as Noel, *Design Liability*]. For a general discussion and listing of cases under these categories, see 2 R. HURSH & H. BAILEY, *supra* note 6, at § 9:1-10.

41. See notes 95-158 *infra* and accompanying text.

42. See notes 159-193 *infra* and accompanying text.

43. 301 N.Y. 468, 95 N.E.2d 802 (1950).

44. *Id.* at 470-71, 95 N.E.2d at 803. In *Campo*, the plaintiff was feeding onions into an onion-topping machine manufactured by the defendant when his hands became caught in the steel rollers of the machine causing severe injuries and eventual amputation. The plaintiff alleged negligence in the design of the machine, claiming available safety devices would have prevented or, at least, mitigated his injuries. Because the complaint failed to allege the existence of a *latent* defect or danger in the onion-topping machine, the court of appeals upheld a dismissal of the complaint. *Id.*

45. *Id.* at 471, 95 N.E.2d at 803.

To appreciate the *Campo* rationale, the observer must consider the historical context within which the decision was promulgated.[46] At the time *Campo* was decided, the affirmative defenses of assumption of risk and contributory negligence were still complete bars to recovery in almost all jurisdictions.[47] The concepts of comparative negligence[48] and strict liability in tort[49] were as yet unapplied, emerging theories, and the courts were still wrestling with the increase in manufacturers' liability which *MacPherson v. Buick Motors Co.*[50] had fostered. The *Campo* decision therefore was a continuation of the protection provided manufacturers from the excessive costs courts feared would result if recovery were granted to all consumers injured by mass-produced products.[51]

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46. Although the *Campo* decision came 34 years after MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which cut through the privity barrier between the injured consumer and the negligent manufacturer, the courts, especially in New York, were still reluctant to increase manufacturers' liability any further than necessary. For a considerable period after *MacPherson*, the New York courts continued to speak in terms of "inherent danger," refusing liability for injury resulting from the use of normally harmless objects. *See, e.g.*, Timpson v. Marshall, Meadows & Stewart, Inc., 198 Misc. 1034, 101 N.Y.S.2d 583 (Sup. Ct. 1950) (high-heeled shoes); Liedeker v. Sears, Roebuck & Co., 249 App. Div. 835, 292 N.Y.S. 541, *aff'd mem.*, 274 N.Y. 631, 10 N.E.2d 586 (1937) (collapsible beach chair). It is therefore not surprising that liability was not extended in *Campo*.

The *Campo* decision finds support in earlier cases from several other jurisdictions, which held that manufacturers were not liable for negligence in design defect cases when the injuries were caused by obviously dangerous farm machinery. *See* Davis v. Sanderman, 225 Iowa 1001, 1004-06, 282 N.W. 717, 719 (1938) (plaintiff was injured by the rollers of a corn shredder); Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940) (farmer injured when he came in contact with whirling universal joint of tractor); Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W. 2d 853 (1948) (plaintiff's arm crushed by exposed rollers of hay baler, necessitating amputation).

47. Comparative negligence analysis gained general acceptance in this country in the early 1970's. *See* HEFT & HEFT, COMPARATIVE NEGLIGENCE, note 27 *supra*, at §§ 2.10-3.58. *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974). At present, at least 20 jurisdictions have adopted, either judicially or legislatively, some form of comparative negligence. *See* Note, *A Reappraisal of Contributory Fault in Strict Products Liability Law*, 2 WM. MITCHELL L. REV. 235, 247 n.109 (1976) (list of statutes and cases adopting the comparative fault approach).

48. *See* note 47 *supra*.

49. *See* note 6 *supra*.

50. 217 N.Y. 382, 111 N.E. 1050 (1916).

51. *See, e.g.*, Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (EX. 1842). The rationale of the *Winterbottom* decision was succinctly stated by Justice Traynor when he pointed out: "The Winterbottom rationale assumed that industry could not grow and prosper if it had to pay for any and all injuries its defective products caused. The assumption rested on the oft-disproved notion that wheels operate at peak efficiency when unattended by brakes." Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364 (1965) [hereinafter cited as Traynor, *The Ways and Meanings*]; *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (4th ed. 1971); Note, *Manufacturers' Liability to Persons Others Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937).

For several years after the *Campo* decision, its rule remained intact.[52] With liberalization of products liability law, however, came a relaxation in the rigidity of the *Campo* rule, first evidenced in the 1960's by the treatment of the obviousness question as one for the jury to decide.[53] The *Campo* rule was further modified by some courts through the use of a subjective standard when determining whether danger was obvious,[54] rather than the objective approach which analyzed whether the danger would have been obvious to a reasonable person as opposed to the individual actually injured.[55]

Several rationales have been offered in support of the latent-patent rule.[56] Among the most significant are: manufacturers are not required to produce accident-proof products;[57] inherently dangerous products provide their own warning of danger;[58] and manufacturers should not be responsible for ignorant product misuse or for the choice of consumers to incur an obvious risk.[59]

The accident-proof rationale of *Campo* is premised on the belief that manufacturers should not be made insurers of their products.[60] Early in

52. It was not until the 1960's that a gradual erosion of the *Campo* doctrine commenced. *See* Marschall, *An Obvious Wrong Does Not Make A Right: Manufactuers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065, 1081 (1973) [hereinafter cited as Marschall, *An Obvious Wrong*].

53. *See* Swearngin v. Sears Roebuck & Co., 376 F.2d 637, 642 (10th Cir. 1967); Rhoads v. Service Mach. Co., 329 F. Supp. 367, 377 (E.D. Ark. 1971); Calkins v. Sandven, 256 Iowa 682, 691, 129 N.W.2d 1,8 (1964); Jennings v. Tamaker Corp., 42 Mich. App. 310, 316, 201 N.W.2d 654, 657 (1972); Bolm v. Triumph Corp., 33 N.Y.2d 151, 156, 305 N.E. 2d 769, 771, 350 N.Y.S. 2d 644, 648 (1974).

54. *See, e.g.*, Hood v. Formatron Corp., 488 P.2d 1281, 1283 (Okla. 1971) (although open throat of flexible hairdryer was obvious danger to adult, it was not obvious to, and therefore not appreciated by, two year-old whose finger was severed by machine).

55. *See, e.g.*, Maas v. Dreher, 10 Ariz. App. 520, 523, 460 P.2d 191, 194 (1969); Inman v. Binghampton Hous. Auth., 3 N.Y.2d 137, 145-46, 143 N.E.2d 895, 899-900, 164 N.Y.S.2d 699, 704-05 (1957).

56. A rationale initially used to support *Campo* but which has since been all but abandoned by the courts is caveat emptor. The theory was used to bar the plaintiff's recovery on the reasoning that the buyer had the alternative not to purchase the goods, and, implicit in his purchase, was the acceptance of any product risks. *See* 2 HARPER & JAMES, *supra* note 28, at 1545; Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) (excellent historical analysis of the theory).

This rationale has failed for the same policy reasons that have supported the shift and modernization of products liability law. No longer are we in the days when a consumer hardy enough to brave the frontier is capable of navigating through our complex, industrialized society without mishap. Increased product complexity and consumer reliance have transformed "caveat emptor" into "caveat venditor." *See generally* LeViness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177 (1943); Note, *Let the Maker Beware*, 19 ST. JOHN'S L. REV. 85 (1945).

57. See notes 60-66 *infra* and accompanying text.

58. See notes 67-73 *infra* and accompanying text.

59. See notes 74-94 *infra* and accompanying text.

60. *See* Bellotte v. Zayre Corp., 531 F.2d 1100, 1103 (1st Cir. 1976); Collins v. Ridge

the development of products liability law, most courts held that careless product users should bear the financial burden of their carelessness rather than positing this burden on financially weak fledgling industries.[61] The tremendous increase in exposure resulting from mass production techniques, the judiciary feared, would excessively expose the manufacturer to liability.[62] In the face of this exposure, the defenses of contributory negligence and assumption of risk were used to mitigate manufacturers' liability, with the *Campo* obviousness standards developing later as a third form of manufacturer protection.[63]

The accident-proof rationale has validity where a product, such as an important drug, has great social utility yet cannot be made completely safe.[64] For such a product the law should not, and does not, impose liability upon a manufacturer who has taken all precautions necessary to make the product as safe as possible.[65] The latent-patent rule, how-

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Tool Co., 520 F.2d 591, 594 (7th Cir. 1975), *cert. denied*, 47 L. Ed. 2d 355 (1976). To prevent strict liability from being absolute liability, the Minnesota Supreme Court has placed limiting factors on the strict liability theory. These factors are that: (1) there was a defect; (2) the defect created an unreasonable danger; (3) the defect was in existence at the time the property was in possession of the defendant being charged; (4) the defect caused the injury; and (5) the injury was not also caused by any voluntary, unusual, or abnormal handling by the plaintiff. Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 39-40, 171 N.W.2d 201, 206 (1969).

61. *See* Traynor, *The Ways and Meanings*, *supra* note 51, at 363. The nineteenth century courts financially insulated growing industries by restricting their duty to the consumer. This protection started to wane as industries became more stable and could afford the cost of product-related injuries. *Id.* An additional rationale is the reluctance of courts to leave to juries the decision on the defectiveness of a product which was developed by experts. Furthermore, the courts feared any finding of liability would open the floodgates to additional claims and suits. Noel, *Design Liability*, *supra* note 40, at 816.

62. Some commentators have offered the additional reasoning that to force the use of safety devices might cause an increase in costs which would be prohibitive and would require manufacturers to remove their products from the market. The financial dynamics of the market force manufacturers to reduce product costs to optimize profits and remain competitive. *See* Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 82-83 (1973). One of the larger costs to the manufacturer is that of quality control inspections. A constant effort is therefore made to reduce these costs to a minimum, sacrificing some safety to reduce costs. *See* Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1086-87 (1965).

63. The *Campo* decision was promulgated in 1950, while the assumption of risk and contributory negligence defenses were available well before then. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 n.1 (4th ed. 1971) (assumption of risk first appeared in a negligence case in 1799, while first usage of contributory negligence occurred in 1809).

64. *See, e.g.*, 3 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 22.4 (2d ed. 1975) (issue in products liability drug cases frequently is adequacy of manufacturer's warning with respect to dangers of drug).

65. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* (1965):

> Comment *k*. *Unavoidably unsafe products*. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field

ever, goes much further, shielding manufacturers of dangerous products from liability regardless of the social utility of the product or the availability of reasonable safety devices or other precautions.[66]

The inherent warning rationale also has some validity, for an adequate warning can relieve a manufacturer from liability in appropriate cases.[67] To justify this rationale, the *Campo* court used as examples an axe, buzz saw, and the exposed propeller of an aircraft, products whose simplistic and singular dangers are easily appreciated by the normal user and which generally cannot be made more safe.[68] The deficiency of this rationale, however, arises either where the product is relatively complex or where it reasonably could have been made more safe.[69] To

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of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

66. *See* HARPER & JAMES, *supra* note 28, at § 28.5, at 1543; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965). A consequence of obviation of the manufacturer's duty is a failure to encourage safety devices or to spread to the producers the costs of the injuries that their products cause. *See, e.g.*, Meyer v. Gehl Co., 36 N.Y.2d 760, 762-65, 329 N.E.2d 666, 667-69, 368 N.Y.S.2d 834, 834-38 (1975) (Fuchsberg, J., dissenting) (summarizes academic and judicial attacks on *Campo* latent-patent doctrine).

67. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *j* (1965):

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warnings, on the container, as to its use. . . . But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized.

68. 301 N.Y. at 472, 95 N.E.2d at 804; *see, e.g.*, Jameison v. Woodward & Lothrop, 247 F.2d 23, 28 (D.C. Cir. 1957) (rubber exerciser characterized as simple item for which warning was not necessary), *cert. denied*, 355 U.S. 855 (1957); Fisher v. Johnson Milk Co., 383 Mich. 158, 174 N.W.2d 752 (1970) (danger of injury from broken bottles was so obvious warning was not required of manufacturer). *See also* RESTATEMENT (SECOND) OF TORTS § 388, comment *k* (1965).

69. As the complexity of the product increases, so too does the difficulty in appreciating the danger inherent in the product. *Compare* Fisher v. Johnson Milk Co., 383 Mich. 158,

be adequate, a warning should be of such import that the user is actually and fully aware of the specific risk of injury inherent in the product[70] and in our modern society few products are so simple as to meet this standard without providing an express, specific warning of the dangers.[71] The *Campo* inherent warning rationale therefore is of extremely limited applicability. In addition, if a safety device reasonably could have been utilized, even a specific warning should not necessarily relieve the manufacturer from liability.[72] The *Campo* decision, though, operates to bar recovery even when a complex product causes the injury, without regard to whether the reasonable safety devices were available, so long as the danger was obvious.[73]

The third primary rationale of the latent-patent rule is that manufacturers should not be liable when their products are misused or are carelessly used by consumers who are fully aware of the dangers involved.[74] Initially, this rationale may seem to have some validity, but it actually represents one of the major problems created by the *Campo* doctrine.[75]

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174 N.W.2d 752 (1970) *with* Wilhelm v. Detroit Edison Co., 56 Mich. App. 116, 150, 224 N.W.2d 289, 305 (1974) (distinguished from *Fisher* because instrumentality causing injury was series of three uninsulated high tension lines) *and* Coger v. Mackinaw Prods. Co., 48 Mich. App. 113, 121-22, 210 N.W.2d 124, 128 (1973) (court refused to view mechanical log splitter as simple tool but rather as "a complicated mechanical contrivance which increased the danger and risks involved manyfold"). In addition, a warning may not obviate liability where the product could reasonably have been made more safe. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* (1965) (warning may relieve manufacturer from liability if "unavoidably unsafe" product is "properly prepared").

70. *See, e.g.*, Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956) (warning must be accurate).Warnings can fail for various reasons. *See* Tinnerholm v Parke Davis & Co., 285 F. Supp. 432, 451-52 (S.D.N.Y. 1968) (insufficient intensity of warning in light of brain damage which resulted from use of drug); Bean v. Ross Mfg. Co., 344 S.W.2d 18, 28 (Mo. 1961) (warning ambiguous and not sufficiently prominent); McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 861-62, 75 S.E.2d 712, 723-24 (1953) (directions without warning of danger are inadequate). *See generally* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1969).

71. *See* Codling v. Paglia, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973):

> Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose.

72. See note 69 *supra*.

73. *See* text accompanying note 45 *supra*.

74. Campo v. Scofield, 301 N.Y. 468, 473-74, 95 N.E.2d 802, 805 (1950).

75. Confusion has plagued many courts in the use of the *Campo* doctrine because they have attempted to apply it in conjunction with other defenses based on plaintiffs' conduct, such as contributory negligence, assumption of risk, and misuse. *See, e.g.*, Tomicich v.

The plaintiff's negligence has always been considered an important factor in establishing liability in personal injury cases, but generally in relation to the affirmative defenses of contributory negligence[76] and assumption of risk[77] or the defense of misuse.[78] These defenses, however, differ markedly from the latent-patent rule, and are much more protective of injured plaintiffs. For example, the affirmative defenses of contributory negligence and assumption of risk must be pleaded and proved by the defendant,[79] and in most jurisdictions only operate to reduce recovery under comparative negligence laws.[80] In contrast, under the latent-patent rule, which is not an affirmaive defense,[81] the plaintiff

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Western-Knapp Eng. Co., 423 F.2d 410, 413 (9th Cir. 1970) (although citing *Campo* for proposition that manufacturer owes no duty for obvious danger, court couched decision in terms of assumption of risk); Neusus v. Sponholtz, 369 F.2d 259, 263 (7th Cir. 1966) (citing *Campo*, court found that either misuse or contributory negligence would bar recovery where fireman climbed jammed ladder knowing safety latches were disengaged).

76. Contributory negligence is an affirmative defense which the defendant has the burden of pleading and proving. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 (4th ed. 1971). Application of the defense is achieved through an objective, reasonable person standard.*See* RESTATEMENT (SECOND) OF TORTS §§ 463, 464 (1965).

77. *See, e.g.*, Parr v. Hamnes, 303 Minn. 333, 337-39, 228 N.W.2d 234, 237-38 (1975) (plaintiff cannot assume risk unless he is aware of specific danger and acts voluntarily and unreasonably in light of that knowledge); Meulners v. Hawkes, 299 Minn. 76, 79-80, 216 N.W.2d 633, 635 (1974) (contributory negligence and assumption of risk distinguished). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 496A-496E (1965); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

78. The defense of misuse is similar to the latent-patent rule in that neither is an affirmative defense and both address the question whether the product which caused the injury was defective. *See* Swain v. Boeing Airplane Co., 337 F.2d 940 (2d Cir. 1964), *cert. denied*, 380 U.S. 951 (1965); Erickson v. Sears, Roebuck & Co., 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966); Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965).

79. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 (4th ed. 1971).

80. *See, e.g.*, MINN. STAT. § 604.01 (1974) (adopted in 1970). Although initially assumption of risk was a complete bar to plaintiff's recovery, in states with comparative negligence laws it generally is considered a type of contributory negligence and subject to comparative negligence analysis. *See, e.g.*, Springrose v. Willmore, 292 Minn. 23, 24-25, 192 N.W.2d 826, 827 (1971).

The courts have reached conflicting results in the issue of whether their states' comparative negligence statutes should apply in strict products liability cases. *Compare* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (strict liability is akin to negligence per se and therefore is subject to Wisconsin's comparative negligence statute) *with* Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) (Oklahoma comparative negligence statute not applicable because strict liability not based on negligence). *See generally* Note, *A Reappraisal of Contributory Fault in Strict Products Liability Law*, 2 WM. MITCHELL L. REV. 235 (1976).

81. Initially, the *Campo* court required the plaintiff plead and prove the latency of the defect in order to establish a prima facie case. *See* 301 N.Y. at 471, 95 N.E.2d at 802. The pleading requirement was vitiated in Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1974). In *Halvorson*, the Minnesota court apparently adopted the *Campo* rule that the plaintiff must prove the danger was not obvious in order to establish

normally must establish that the danger was not obvious[82] and if he fails to do so he is barred from recovery despite any comparative negligence laws.[83]

Additionally, to establish the defense of assumption of risk, the defendant must prove not only that the plaintiff was aware of the danger but also that the plaintiff acted voluntarily and unreasonably in light of that awareness.[84] Under *Campo*, however, obviousness alone bars recovery.[85] Because both theories stress awareness of the danger, the

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that the product was defective. *See* ___ Minn. at ___, 240 N.W.2d at 308. In *Halvorson*, the court suggested that lack of obviousness was not an affirmative defense but part of the plaintiff's burden of proof. *Id.*

82. *See* Siemer v. Midwest Mower Corp., 286 F.2d 381, 385 (8th Cir. 1961); Hays v. Western Auto Supply Co., 405 S.W.2d 877, 882 (Mo. 1966); Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 519 (Wyo. 1964) (plaintiff must prove latency of danger).

The *Campo* decision is not clear as to whether an objective or subjective standard should be applied when determining whether the danger was obvious. The issue was clarified, however, in Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957), where the court based its findings that the danger of personal injury from falling off an unrailed house porch was obvious on an objective evaluation of the defect as seen by a reasonable person. This decision has been criticised for not focusing on the latency of the danger as distinguished from the defect. *See* Noel, *Design Liability*, *supra* note 40, at 838. *Inman* also is inconsistent with the inherent warning rationale which requires full appreciation of the risk. *But see* Hardy v. Hill Corp., 446 F.2d 34 (9th Cir. 1971) (court, citing *Campo*, in an industrial accident case found that unreasonably dangerous defect criteria of strict liability was determined by objective rather than subjective standard). The Minnesota Supreme Court, on the other hand, seems to have applied a subjective standard when invoking the latent-patent test. *See* Halvorson v. American Hoist & Derrick Co., ___ Minn. ___, ___, 240 N.W.2d 303, 308 (1976) (court stresses that "the plaintiff . . . knew of the danger involved"); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 43, 171 N.W.2d 201, 208 (1969) ("The awareness, which has been clearly established by plaintiff's testimony, not only negatives any claim of defect, but certainly takes this snowmobile out of the category of being unreasonably dangerous.").

83. For a plaintiff to establish a negligence cause of action, he must prove the defendant owed a duty to him, that the duty was breached by the defendant, that the breach was a direct cause of plaintiff's injuries, and that the plaintiff in fact suffered an injury. *E.g.*, Schmanski v. Church of St. Casimer of Wells, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954). To establish his prima facie case in a strict products liability action the plaintiff must prove a defect which caused an unreasonable danger, that the defect existed at the time the product left the manufacturer's control, and that the defect caused the injury. *E.g.*, Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 39-40, 171 N.W.2d 201, 206 (1969). The effect of the obvious characteristic of the danger under the *Campo* doctrine is to obviate the manufacturer's duty in a negligence action and the existence of a defect in a strict products liability action. *Compare* Poppell v. Waters, 126 Ga. App. 385, 190 S.E.2d 815 (1972) *with* Magnuson v. Rupp Mfg. Inc., 285 Minn. 32, 171 N.W.2d 201 (1969). Therefore, because comparative fault analysis is only applicable when the plaintiff establishes his prima facie case, the *Campo* doctrine precludes use of the comparative fault approach where the danger was obvious. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67 (4th ed. 1971).

84. *See, e.g.*, Haessly v. Lotzer, ___ Minn. ___, ___, 245 N.W.2d 841, 844 (1976) (assumption of risk refers to "conscious and voluntary decision to encounter a known risk.").

85. See note 45 *supra* and accompanying text.

latent-patent rule is applicable in most instances where the assumption of risk defense might apply, but the difference in result depending on the theory utilized can be drastic.[86]

The *Campo* doctrine differs from the misuse defense in that the latter is applicable where the injured person used the product in a manner which the manufacturer could not reasonably be expected to foresee.[87] The misuse defense basically embodies the concept that a product is not defective if it is safe only for ordinary and foreseeable uses,[88] thereby requiring the manufacturer, as an expert, to make the product safe for such foreseeable uses.[89] The latent-patent test, however, is not concerned with whether the plaintiff's use of the product was foreseeable by the manufacturer, so long as the danger was obvious. Because any danger obvious to the normal user undoubtedly will be foreseeable to the manufacturer, the *Campo* doctrine encompasses the misuse defense and renders it largely irrelevant as a distinct legal concept.[90]

The concepts of misuse, assumption of risk, and comparative negli-

86. *See, e.g.,* Kerber v. American Mach. & Foundry Co., 411 F.2d 419, 421 (8th Cir. 1969) (applying Missouri law and *Campo* doctrine, court found no manufacturer's duty in products liability case; holding supported by ruling that plaintiff's actions may have been assumption of risk). By applying the latent-patent test instead of assumption of risk, the protection afforded the injured plaintiff may be significantly reduced for several reasons. First, although the defect may be obvious, the specific danger created by it may not be. Second, the user of the product may be in a position where he has no alternative but to use the product in spite of the danger. Third, the latent-patent rule serves to bar recovery, while the assumption of risk defense normally only reduces recovery. *See* Marschall, *An Obvious Wrong, supra* note 52, at 1085-86.

87. *Compare* Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 855-56 (5th Cir. 1967) (unintended and unforeseen mixture of products of two cosmetics manufacturers excused makers for responsibility for any injury), *cert. denied,* 391 U.S. 913 (1968) *with* Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 327-31, 229 N.E.2d 684, 690-91 (1967) (misuse of claw hammer where it is used by plaintiff on farm machinery is foreseeable).

88. *See, e.g,* Troszynski v. Commonwealth Edison Co., 42 Ill. App. 3d 925, 930, 356 N.E.2d 926, 930-31 (1976); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 261 N.E.2d 305, 309 (1970) ("use it for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant"); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk,* 25 VAN. L. REV. 93, 95-96 (1972).

89. Concerning the foreseeability factor, the manufacturer is held to the knowledge and skill of an expert in his industry to ensure he keeps abreast of industry product changes and provides sufficient research into the consumer use of products. *See, e.g.,* Green v. Volkswagen of America, Inc., 485 F.2d 430, 433 (6th Cir. 1973) (in defining a product defect, court stated that "[i]t also requires proof that the nature of 'the defect' was such that the manufacturer under the reasonable man standard could have foreseen that someone might be injured thereby"); Gardner v. Q.H.S., Inc., 448 F.2d 238, 242-43 (4th Cir. 1971); McCormack v. Hankscraft Co., 278 Minn. 322, 331-32, 154 N.W.2d 488, 496 (1967).

90. If the danger of consumer injury was obvious to the consumer, it should be foreseeable and necessitate either a warning, safety device, or instructions for its safe use. *See, e.g.,* Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 326, 79 N.W.2d 688, 693-94 (1956).

gence represent an equitable approach whereby the manufacturer is required to make his products safe for all foreseeable uses while at the same time the plaintiff's recovery is reduced if he is aware of the danger yet voluntarily and unreasonably uses the product.[91] Adoption of the latent-patent rule, however, destroys the utility of this approach. By denying recovery solely because the danger created by the product was obvious,[92] the rule punishes the injured plaintiff even if he has not acted voluntarily and unreasonably, frustrates the important policy considerations underlying comparative negligence, and allows the manufacturer to avoid liability even though it has placed a product in the market which creates foreseeable dangers.[93]

In summary, the latent-patent rule and its rationales are contrary to the general thrust of modern products liability law. The rule paints with a broad brush, covering all products regardless of their social utility, the availability of safety devices and warnings, or the foreseeable dangers they create. As a consequence, manufacturers are neither encouraged to make their products more safe nor required to pay compensation for the injuries caused by their dangerous products.[94]

III. The Minnesota Approach to Obviousness

The Minnesota approach to the concept of the obvious danger will be analyzed in the following four stages: case law discussing the role of obviousness; the social policy underlying current Minnesota products liability law and how *Halvorson* conflicts with that policy; the definition of a defect as defined by the Minnesota Supreme Court and how the adoption of the latent-patent rule would affect that definition; and finally the problems raised by *Halvorson* in conjunction with Minnesota's comparative fault scheme.

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91. *See, e.g.*, Note, *A Reappraisal of Contributory Fault in Strict Products Liability Law*, 2 Wm. Mitchell L. Rev. 235, 248-49 (1976).

92. *See, e.g.*, Maas v. Dreher, 10 Ariz. App. 520, 523, 460 P.2d 191, 194 (1969) (court applied objective, reasonable man standard in determining whether danger was obvious); Parker v. Healser Plumbing & Heating Co., 388 P.2d 516, 518 (Wyo. 1964) (where no latent defect can be proved there is no recovery).

93. This is repugnant to current loss allocation theories. Most courts and commentators find that the primary objective of current liability theories is to produce safer products, not more obviously dangerous ones. *See, e.g.*, Palmer v. Massey Ferguson, Inc., 3 Wash. App. 508, 517, 476 P.2d 713, 719 (1970).

94. *See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753, 759 (E.D. Pa. 1971) ("manufacturers ought to make safer not more dangerous products"), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); Askew v. Howard-Cooper Corp., 263 Ore. 184, 187, 502 P.2d 210, 212 (1972) (dissenting opinion) (literal effect of *Campo* rule is to encourage more obvious defects rather than safer products; standard of manufacturer foreseeability should be used); Palmer v. Massey Ferguson, Inc., 3 Wash. App. 508, 517, 476 P.2d 713, 719 (1970) ("The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form").

A. *The Concept of Obviousness in Minnesota Law*

The concept of awareness or obviousness as a bar to recovery finds its Minnesota origins in early Minnesota products liability law. In the 1892 case of *Schubert v. J.R. Clark Co.*,[95] the Minnesota court adopted a standard similar to that enunciated in *Campo*. The *Schubert* court, in a well-written opinion, held that the manufacturer of a product, which had a danger known to the manufacturer but concealed from the user, was liable for injuries arising from use of the product.[96] Although *Schubert* and its progeny[97] are similar to *Campo*, at the time *Schubert* was decided it actually was a liberal, vanguard decision.[98] Obviously, in the volatile products liability area, a decision that would have been heralded 85 years ago is not necessarily an appropriate one today.

Early vestiges of the latent-patent rule can also be found in the "simple tool doctrine."[99] This doctrine of master-servant relations was founded on the premise that the employer had a duty to use ordinary care in keeping instrumentalities and working areas safe through reason-

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95. 49 Minn. 331, 51 N.W. 1103 (1892).

96. *Id.* at 336, 51 N.W. at 1104. *Schubert* involved an employee who was injured while climbing a ladder made of defective wood. The employee sued the manufacturer, based upon negligence. Despite the lack of privity, the court refused to dismiss plaintiff's complaint, reasoning as follows:

> It would constitute an actionable wrong for the defendant to thus knowingly and unnecessarily do what it had reason to suppose would result in injury to the plaintiff without the intervention of any fault or neglect on his part or on the part of any other person. If the defendant knowingly delivered such an article for the plaintiff's use, it was his duty to warn him of the danger by disclosing the hidden defects; and neglect of that duty would constitute actionable negligence. Every one may be supposed to understand that such articles are manufactured, sold, and disposed of, with a view of their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer, ordinarily assumes without inquiry, and without any express warranty, that it is what it appears to be, a thing intended for actual use; and that it has not been so negligently manufactured that by reason of concealed defects its use will be attended with danger of serious injury.

Id.

97. *See* O'Brien v. American Bridge Co., 110 Minn. 364, 125 N.W. 1012 (1910) (in case involving a defective bridge, court held that builder was liable when bridge collapsed and injured plaintiffs, since danger was concealed); Holmvik v. Parsons Band Cutter & Self-Feeder Co., 98 Minn. 424, 108 N.W. 810 (1906) (defendant manufacturer of self-feeder deck held liable for injuries resulting from collapse of deck, since danger created by defective deck was known by manufacturer but was not obvious to plaintiff).

98. *Schubert* was decided 24 years before MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which is considered by most authorities as marking the commencement of modern American products liability law. See note 46 *supra* and accompanying text.

99. *See* Heise v. J. R. Clark Co., 245 Minn. 179, 71 N.W.2d 818 (1955) (collapsed ladder not simple tool); Person v. Okes, 224 Minn. 541, 29 N.W.2d 360 (1947) (step stool is simple tool); Mozey v. Erickson, 182 Minn. 419, 234 N.W. 687 (1931) (stepladder is simple tool).

able inspections.[100] The master did not have this responsibility for simple or common tools.[101] Rationales very similar to that found in *Campo* supported this doctrine,[102] as well as the reasoning that the employer and employee had equal ability to ascertain dangers and prevent injuries.[103] The simple tool doctrine was not expanded by the Minnesota court into areas where the danger was latent or where other than very simple tools such as step ladders were involved.[104] Thus, early in Minnesota tort law, the employee was made to bear the costs of injuries suffered in the use of uncomplicated products with obvious dangers.

More recently, the role of obviousness was revitalized in *Magnuson v. Rupp Manufacturing, Inc.*,[105] a Minnesota strict products liability case which placed great emphasis on the awareness concept.[106] The *Magnuson* court held the plaintiff-snowmobiler's knowledge of the dangerous placement of the spark plug,[107] which jammed against and severely injured his knee,[108] obviated the existence of a defect under the strict products liability theory.[109] The *Magnuson* decision is confusing, with numerous alternative holdings,[110] the apparent result of the court's initial grappling with concept of strict products liability.[111] The court's formula for a prima facie strict liability case in *Magnuson* concluded with the unique additional requirement that the injury must not be caused by a voluntary, unusual, or abnormal handling of the product by the plaintiff;[112] this was interpreted as requiring that the plaintiff not

100. *E.g.*, Person v. Okes, 224 Minn. 541, 543, 29 N.W.2d 360, 362 (1947) (small stepladder is simple tool).

101. *Id.*

102. *Id.* at 543, 29 N.W.2d at 362 ("The rule has no application where the master has knowledge of the defect and the servant does not and where the defect is of such a character as not to be obvious from observation ordinarily accompanying its use.").

103. *Id.* at 543-44, 29 N.W.2d at 362.

104. *See* Heise v. J. R. Clark Co., 245 Minn. 179, 186-87, 71 N.W.2d 818, 823-24 (1955).

105. 285 Minn. 32, 171 N.W.2d 201 (1969).

106. *See generally* Comment, *Products Liability: The Victim's Conduct as a Bar to Recovery-The Minnesota Supreme Court Reaffirms the* Magnuson *"Limiting Factors,"* 1 WM. MITCHELL L. REV. 207 (1974).

107. 285 Minn. at 41, 171 N.W.2d at 207.

108. *Id.* at 36, 171 N.W.2d at 204.

109. *Id.* at 42, 171 N.W.2d at 208.

110. Note, *A Reappraisal of Contributory Fault In Strict Products Liability Law*, 2 WM. MITCHELL L. REV. 235, 253 (1976) (*Magnuson* court based its ruling on alternative grounds of contributory negligence, assumption of risk, abnormal use, mishandling, lack of proximate causation, and lack of defect).

111. *Magnuson* represents the first time the Minnesota court was faced with the issue of the role of contributory fault in the strict products liability theory.

112. 285 Minn. at 39-40, 171 N.W.2d at 206. In establishing the elements of a strict products liability case, the court stated:

> In summary, we find that under the strict liability doctrine plaintiff must prove (1) a defect; (2) causing unreasonable danger; (3) in existence at the time the product was in possession of the defendant to be charged; (4) causing injury;

be aware of the danger.[113] *Magnuson* therefore can be read as holding that obvious dangers preclude a finding of a defect, but the case is not entirely clear on this issue.

The *Halvorson* court, relying in part on *Magnuson*, again emphasized the role of awareness in Minnesota products liability law.[114] The injured plaintiff's testimony that he was aware of the lethal dangers created by overhead power lines was given great emphasis by the court.[115] Relying on the plaintiff's awareness, the court precluded recovery by finding that the manufacturer did not have a duty to protect against electrical injuries because the danger was obvious.[116] *Halvorson* unfortunately suffers from the same problems as *Magnuson*, with the case being susceptible to at least three possible interpretations. Because it cites *Campo* favorably, *Halvorson* can be interpreted as adopting the latent-patent rule for all Minnesota products liability cases.[117] Alternatively, *Halvorson* can be read as adopting the latent-patent rule only in situations where the danger was obvious, the plaintiff had special knowledge of the danger, and the manufacturer provided warnings of the danger.[118] Finally, *Halvorson* can be interpreted as adopting the *Campo* doctrine only where the elements of the second interpretation are present and in addition the manufacturer had no reasonable safety devices available to correct the danger.[119] Although uniform in their emphasis on awareness, both *Magnuson* and *Halvorson*, because of their susceptibility to varied interpretations, therefore, are inadequate for use as statements of the proper role of awareness in Minnesota products liability law.

In contrast to the approaches taken by the court in *Magnuson* and *Halvorson*, it has treated awareness quite differently on other occasions. An example is the court's only pre-*Halvorson* examination of the *Campo* decision, which occurred in *Clark v. Rental Equipment Co.*,[120] a case involving a plaintiff who was injured when he inadvertently fell from a scaffold. The court founded its decision for the injured plaintiff on the rationale that stringent standards should be imposed upon the lessors of potentially dangerous products.[121] No great quantum of experience or

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and (5) *injury was not caused by any voluntary, unusual, or abnormal handling by the plaintiff.* [emphasis by the court].

113. *Id.* at 40-42, 171 N.W.2d at 207-08.

114. ___ Minn. at ___, 240 N.W.2d at 308.

115. *Id.*

116. *Id.* ("The general rule in other jurisdictions is that there is no recovery where the danger is obvious.")

117. *Id.*

118. See notes 30-33 *supra* and accompanying text.

119. See notes 34-38 *supra* and accompanying text.

120. 300 Minn. 420, 220 N.W.2d 507 (1974).

121. *Id.* at 424, 220 N.W.2d at 510.

awareness is necessary for one to appreciate the dangers of an unguarded scaffold suspended twenty feet from the ground;[122] yet the court refused to apply *Campo* to bar recovery.[123] *Halvorson* appears to be in direct conflict with *Clark*, rendering the opposite result by completely precluding recovery[124] rather than placing the responsibility on the product distributor to guard against obvious dangers.[125]

The court's most recent analysis of plaintiff's awareness of dangers, aside from *Halvorson*, is *Ferguson v. Northern States Power Co.*,[126] which like *Halvorson* involved electrical injuries.[127] In *Ferguson*, the plaintiff was a teenage urban resident who was injured severely when he accidentally contacted a high voltage uninsulated electrical distribution line while trimming a tree in his backyard.[128] Although the court agreed that the urban dweller should be aware that backyard lower voltage utility wires transmit electricity,[129] it refused to hold that the ordinary city dweller should be required to be aware of the type of lethal charge contained in the lines which injured the plaintiff.[130] The lines

122. The undisputed testimony by an eyewitness was that the plaintiff merely walked off the end of the unguarded scaffold. *Id.* at 423, 22 N.W.2d at 509. Some courts have been particularly tough on manufacturers where the product user was injured because of his momentary inadvertence. *See, e.g.*, Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972), *noted in* 86 HARV. L. REV. 923 (1973). In *Bexiga*, a machine operator's hands were crushed in a punch press and he sued the manufacturer alleging defective product design because physically and financially feasible safety designs were available which would have prevented the injury. The New Jersey Supreme Court held that the manufacturer of a machine unreasonably dangerous because it lacked feasible safety devices could not avoid liability by asserting that the employer of the injured plaintiff should have provided the safety equipment. The court also denied the manufacturer the defense of contributory negligence based on the rationale that it would be inherently inequitable to find an affirmative duty on the manufacturer's part to provide the safety device and then allow him to escape liability because of the user's conduct.

123. The *Clark* court was faced with the *Campo* doctrine through its discussion of a New York scaffold case that was decided under *Campo*, Sarnoff v. Charles Schad, Inc., 49 Misc. 2d 1059, 269 N.Y.S.2d 22 (1966). Without directly addressing the *Campo* rule, the *Clark* court circumvented it by finding an increased duty of the lessor in this particular fact situation.

124. See note 24 *supra* and accompanying text.

125. Since *Halvorson* was decided the Minnesota court has not remained consistent in its approach to plaintiff's awareness. In Goblirsch v. Western Land Roller Co., ___ Minn. ___, 246 N.W.2d 687 (1976), plaintiff was injured when he placed his hand in a corn grinding machine. The danger apparently was obvious, yet the court, without reference to *Campo* or *Halvorson*, based its decision for the defendant on traditional assumption of risk principles.

126. ___ Minn. ___, 239 N.W.2d 190 (1976).

127. *Id.* at ___, 239 N.W.2d at 192.

128. *Id.*

129. *Id.* at ___, 239 N.W.2d at 194.

130. *Id.* ("We cannot conclude, absent special knowledge or warning, that he should be expected to anticipate the presence of such a lethal charge as is contained in high-voltage transmission lines . . . .").

that injured Ferguson were of the same type as those that injured Halvorson,[131] yet the *Ferguson* court, which could have barred recovery under *Campo,* instead held that the danger was not obvious and that the defendant had a "high duty" to protect against such injuries.[132] The apparent contradiction between *Ferguson* and *Halvorson* possibly can be reconciled by consideration of the type of plaintiff injured. Halvorson, a street construction worker, presumably had a greater appreciation of the dangers of electrical distribution lines[133] than Ferguson, an ordinary city resident.[134] The difference in ability to appreciate the danger between the *Halvorson* and *Ferguson* plaintiffs, however, is tenuous at best, since both plaintiffs admitted at trial that they were aware of the deadly quality of electricity[135] and Halvorson was a laborer with no apparent expertise concerning electricity.[136] Minnesota law on the proper treatment of obviousness therefore is not clear despite the apparent decision in *Halvorson* to adopt the *Campo* doctrine.

B. *The Conflict Between* Halvorson *and the Social Policy Underlying Minnesota Strict Products Liability Law*

In *McCormack v. Hankscraft, Inc.,*[137] the Minnesota Supreme Court first stated its approval of the doctrine of strict products liability,[138] basing its approval on the more equitable cost distribution achieved by passing the costs of product-related injuries to manufacturers of the dangerous products.[139] This loss distribution rationale is premised on the belief that product manufacturers are in the optimum position in the distribution sequence to reduce or eliminate hazards and to absorb and pass on the costs of product-related injuries.[140] This rationale was most succinctly stated in *Lee v. Crookston Coca-Cola Bottling Co.,*[141] where

131. In both *Halvorson* and *Ferguson,* the plaintiffs were injured by 8,000 volt uninsulated power lines.

132. ___ Minn. at ___, 239 N.W.2d at 194. The primary substantive issue in *Ferguson* was whether the court should adopt the abnormally dangerous theory of strict liability for injuries caused by uninsulated, electrical transmission lines. The court rejected this theory, but nonetheless held the electrical company to a "high duty of care."

133. ___ Minn. at ___, 240 N.W.2d at 308.

134. ___ Minn. at ___, 239 N.W.2d at 193.

135. *Compare* Halvorson v. American Hoist & Derrick Co., ___ Minn. ___, ___, 240 N.W.2d 303, 305 (1976) ("Plaintiff Halvorson testified that he knew power lines . . . were dangerous") *with* Ferguson v. Northern States Power Co., ___ Minn. ___, ___, 239 N.W.2d 190, 192 (1976) (plaintiff was aware that uninsulated power lines were dangerous but testified he did not know line that injured him was uninsulated).

136. ___ Minn. at ___, 240 N.W.2d at 304 (plaintiff worked on highway construction crew); Trial Transcript at 146 (plaintiff only had eighth grade education).

137. 278 Minn. 322, 154 N.W.2d 488 (1967).

138. *Id.* at 338, 154 N.W.2d at 499-500.

139. *Id.* at 338, 154 N.W.2d at 500.

140. *Id.*

141. 290 Minn. 321, 188 N.W.2d 426 (1971).

the court summarized the four major reasons for the strict products liability theory. The court first pointed out that public interest in safety was furthered by discouraging manufacturers from marketing dangerous products to users who are in many cases unable to comprehend the danger due to product complexity.[142] Second, the court reiterated its acceptance of the rationale that manufacturers are in the best position to bear and distribute the losses occassioned by product-related injuries.[143] The third rationale cited by the court was that legal protection should be afforded the consumer to promote product safety and encourage manufacturers to settle claims rather than litigate them.[144] Finally, the ability to bring an action directly against the manufacturer was favored by the court.[145] These policy considerations in effect are premised upon the more equitable allocation of the losses caused by modern products and on increased manufacturer responsibility to produce safe products.[146]

If *Halvorson* is interpreted as adopting the latent-patent rule for all products liability cases, it clearly frustrates these important social and economic policies. So long as the danger is patent, the defendant manufacturer of foreseeably dangerous products would not have a duty to protect the product user from injury. Consequently, the plaintiff would be foreclosed from recovery and any loss distribution which might have occurred would be lost. In addition, the manufacturer would not be deterred from producing foreseeably dangerous products but rather would be exculpated from liability whenever the danger is latent. Therefore, if the important policies expressed by the Minnesota Supreme Court in *McCormack* and *Lee* are to be preserved, the apparent decision in *Halvorson* to adopt the latent-patent rule must be modified.

C. *Definition of a Defective Product*

The Minnesota Supreme Court, in the ten years since it first adopted the strict products liability theory,[147] has yet to establish a coherent definition of what constitutes a defective product.[148] *Halvorson* both

142. *Id.* at 327, 188 N.W.2d at 431.

143. *Id.* at 328, 188 N.W.2d at 431.

144. *Id.*

145. *Id.* at 328, 188 N.W.2d at 431-32.

146. In *Lee*, the court did not include awareness as one element of the plaintiff's prima facie case, as was done in *Magnuson*, but rather cited *Magnuson* as holding that awareness is a factor under the assumption of risk defense. *See* 290 Minn. at 329-30, 188 N.W.2d at 432.

147. The Minnesota Supreme Court first expressed its approval of the strict products liability theory in 1967. *See* McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).

148. The most thorough attempt by the Minnesota court to define what constitutes a defective product occurred in Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970). The court in *Farr* stated that "a product is defective if it fails to perform

exemplifies and exacerbates this problem.

The confusion in Minnesota products liability law is well illustrated by the *Halvorson* jury instructions and resulting jury findings. The trial court instructed the jury under the strict liability count on three separate definitions of what constitutes a defective product, and also gave a negligence instruction. Applying these instructions, the jury, apparently and understandably confused, found the defendant was negligent but not strictly liable. The Minnesota Supreme Court, however, held the jury findings were inconsistent, on the theory that the strict liability theory subsumes the negligence theory and therefore a finding of no strict liability necessarily precludes a finding of negligence. Although much respected authority can be found supporting the court's holding,[149] the supposed inconsistency in the jury's findings can be logically rationalized based on the varying standards set forth in the jury instructions.

The strict liability instructions given to the jury emphasized a consumer expectation standard, whereby a product is not defective if it meets the safety expectations of ordinary consumers.[150] Conversely, however, the negligence instruction made liability turn on traditional negligence concepts relating to the reasonableness of the manufacturer's conduct in producing the crane.[151] A determination that consumer expectations were low with respect to the danger of electrocution and that therefore the defendant was not strictly liable does not necessarily preclude a finding that the manufacturer failed to exercise due care in the design of its crane.[152] In other words, fault might exist despite the fact that the consumer expectation standard was met.

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reasonably, adequately and safely the normal, anticipated or specified use to which the manufacturer intends that it be put." *Id.* at 89, 179 N.W.2d at 68. This definition is similar to that contained in the RESTATEMENT. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* (1965).

149. *See, e.g.*, Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 *passim* (1973); Note, *Products Liability: The Victim's Conduct as a Bar to Recovery-The Minnesota Supreme Court Reaffirms the* Magnuson *"Limiting Factors,"* 1 WM. MITCHELL L. REV. 207, 217 (1974) (cited in *Halvorson*). *See generally* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 1:1-:43 (1974).

150. The three definitions of a defect under the strict liability count were (1) a product is not defective if it performs reasonably, adequately, and safely for its normal, intended, and anticipated uses; (2) a product is not defective, even though dangerous, when used by a person with common community knowledge as to the product's characteristics and usage; and (3) a product is defective if not reasonably fit for the ordinary purposes for which it is sold and expected to be used. ___ Minn. at ___, 240 N.W.2d at 306.

151. The trial court stated in its negligence instructions that defendant was liable if it failed to use reasonable care in the design, manufacture, inspection, and testing of the product to protect users from unreasonable risk of harm, and that the manufacturer must warn against reasonably foreseeable dangers. *Id.* at ___, 240 N.W.2d at 306-07.

152. *See* Twerski, *From Defect to Cause to Comparative Fault-Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977) (excellent analysis of difference between strict liability, consumer expectation standard and traditional risk utility, negligence standard; suggests liability should be imposed if either standard is breached).

When the consumer expectation standard is coupled with the rule that one cannot be negligent if found not to be strictly liable, the result can be that a manufacturer is protected from liability even if negligent. This incongruous result is magnified if the *Campo* doctrine is utilized, since it basically represents an extreme extension of the consumer expectation standard, obviating liability for obvious dangers regardless of the reasonableness of the defendant's actions. Consequently, the *Campo* doctrine clearly is an inappropriate, backward concept which should not be adopted in Minnesota. In addition, *Halvorson* indicates the need to establish a coherent approach to the issue of defectiveness to the exclusion of all others, since failure to do so is productive of practical problems in the day-to-day application of the strict products liability theory in an understandable fashion.[153]

D. Halvorson's *Conflict with Minnesota's Comparative Fault Scheme*

An additional problem created by *Halvorson* concerns the defense of assumption of risk and Minnesota's comparative negligence statute. In 1970, the Minnesota Legislature adopted a comparative negligence statute.[154] Shortly thereafter, the Minnesota Supreme Court in *Springrose v. Willmore,*[155] emphasizing the important policies underlying comparative fault, decided the statute should apply to the assumption of risk defense.[156] Thus, proof of assumption of risk normally will operate only to reduce recovery.[157] The court also has emphasized in recent years that to establish that the plaintiff assumed the risk, the defendant not only must show the plaintiff was subjectively aware of the danger, but also that the plaintiff voluntarily and unreasonably encountered the known danger.[158] Under the latent-patent rule, however, the above protections

153. In this respect, Dean Keeton's observations are appropriate:

> Our supreme courts should arrive at a theory of recovery to the exclusion of all others. Trial judges cannot under the present state of the law be criticized for being unable to submit a product liability case to a jury in a satisfactory manner. This situation emphasizes the fact that lack of efficiency in the administration of justice is often due to the complexities and ambiguities of the substantive law rather than to either court organization or court procedures.

Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 36 (1973).

154. MINN. STAT. § 604.01 (1976).

155. 292 Minn. 23, 192 N.W.2d 826 (1971).

156. *Id.* at 26, 192 N.W.2d at 828. The court noted that the comparative negligence statute did not specifically apply to the assumption of risk defense but nonetheless made the defense subject to the statute, stating that "the apportionment of loss between blameworthy plaintiffs and defendants is in harmony with its [the legislature's] manifest determination of public policy regarding tort reparation." *Id.*

157. Under Minnesota's comparative negligence statute recovery is still barred if the plaintiff's negligence is equal to or greater than the negligence of the defendant. *See* MINN. STAT. § 604.01 (1976).

158. *See, e.g.,* Haessly v. Lotzer, ___ Minn. ___, ___, 245 N.W.2d 841, 844 (1976) (plaintiff did not assume risk because he did not voluntarily use stairway with "full

afforded plaintiffs are eliminated. Obviousness alone bars recovery, and, because the plaintiff cannot prove the product was defective if the danger was obvious, the comparative negligence statute is not applicable. As a result, the *Campo* doctrine in effect supersedes both the assumption of risk defense and the comparative negligence statute in all cases where the danger is obvious, thus frustrating the important policy of allocating costs which underlies Minnesota's comparative fault scheme.

The above discussion indicates the latent-patent rule, as apparently adopted in *Halvorson,* clearly is inappropriate in Minnesota, being in conflict with the important policies established both by the Minnesota Supreme Court and the Minnesota Legislature. In its stead, a balancing approach should be utilized which more equitably allocates responsibility in products liability cases.

IV. THE BALANCING APPROACH—AN ALTERNATIVE TO *Campo*

Several recent, well-reasoned decisions have abandoned the *Campo* doctrine and have adopted a balancing approach in which obviousness is but one minor factor to consider when determining whether the product was unreasonably dangerous.[159] The unreasonably dangerous determination is based upon a balancing of the likelihood and severity of the injury with the precautions which would have been necessary to make the product safe.[160] Within this formula, obviousness may be relevant in determining the likelihood of injury, for if the danger is obvious, the product user probably will take steps to protect himself, thereby decreasing the likelihood of injury.[161] Through this balancing approach, the courts attempt to view the entire situation which produced the injury, including the foreseeability of the injury, the utility of the product, the ability to make safer products, and the seriousness of probable injuries.[162] As a result, the balancing approach substantially mitigates the rigidity of the *Campo* rule by eliminating obviousness as an automatic bar to recovery.[163]

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knowledge and conscious awareness of the unique and special hazards" of stairway).

159. *See* Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd,* 474 F.2d 1339 (3d Cir. 1973); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

160. The approach is actually quite similar to traditional negligence analysis, which involves a balancing of several factors rather than complete reliance on only one factor. *See, e.g.,* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (famous calculus of duty formula); Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

161. *See* Dorsey v. Yoder Co., 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff'd,* 474 F.2d 1339 (3d Cir. 1973).

162. *See* note 171 *infra* and accompanying text.

163. This is the rationale the New York Court of Appeals relied upon when abandoning the *Campo* doctrine. *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

The reasoning of a leading case, *Dorsey v. Yoder Co.*,[164] illustrates the use of this balancing approach. In *Dorsey*, the plaintiff factory worker's hand was sucked into the blades of a metal slitter and almost amputated.[165] Plaintiff alleged defective design because of the lack of an adequate safety device,[166] and defendant manufacturer responded by asserting that the danger was obvious and therefore recovery was barred under *Campo*.[167] The case could have been resolved expeditiously by applying the latent-patent rule, since the facts indicate the danger created by the metal slitting machine was obvious to the plaintiff.[168] The *Dorsey* court, however, rejected the *Campo* approach and held that obviousness is only one factor in determining whether the product was unreasonably dangerous.[169] Quoting from an important article by Dean Wade,[170] the court suggested seven relevant factors which must be considered in determining whether the product was defective: (1) the social utility of the product; (2) availability of safer products to meet the same need; (3) likelihood of injury and its probable seriousness; (4) obviousness of the danger; (5) common public knowledge and expectations of the danger; (6) avoidability of injury through instructions and warnings; and (7) availability of not unduly expensive safety devices or safer designs. Weighing all these considerations, the court ruled that a jury verdict for the plaintiff was justified despite the obviousness of the danger.[171]

When discussing the role obviousness should play within the balancing test, the *Dorsey* court made clear that it was relevant primarily in relation to simple, established products with well-understood dangers.[172] The court used as an example a sharp knife,[173] which it stated would not be unreasonably dangerous because the danger is obvious, a safety device would destroy its utility, and the cost of making it safe would be prohibitive.[174] Because of simple, common products such as knives, which can cause injuries even when properly made and whose potential

164. 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973).

165. *Id.* at 757.

166. *Id.* at 757-64 (plaintiff alleged negligence and strict liability, but case was decided under strict liability theory).

167. *Id.* at 757-58.

168. *Id.* at 757 (plaintiff placed hand nine inches from cutters to prevent metal from buckling and failed to use hold down bar that had been provided by machine manufacturer for that purpose).

169. *Id.* at 759.

170. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965).

171. 331 F. Supp. at 760. The court balanced the fact that a safety guard was affordable and would not interfere with the operation of the machine against the severe injuries that resulted from the accident and found that the jury was justified in tipping the balance to the plaintiff's favor in finding the product defective.

172. *Id.* at 759-60.

173. *Id.* at 759.

174. *Id.* at 760.

dangers are understood by the general public, the obviousness factor must remain a part of the balancing approach.[175] However, when the product is neither simple nor common, such as complex machinery or even a lawn mower, the clear tendency of the better reasoned decisions applying the balancing approach has been to minimize or eliminate obviousness of the danger as a factor when deciding whether the product was unreasonably dangerous.[176] A vivid example of this tendency is found in *Micallef v. Miehle Co.*,[177] a recent decision by the New York Court of Appeals, the same court that established the latent-patent rule in *Campo*.

In *Micallef*, the plaintiff, an offset printing press operator, was severely injured when he purposely placed his hand on a printing plate cylinder which was spinning at a high rate of speed.[178] The machine was 150 feet long, fifteen feet high, and five feet wide, and it was capable of printing approximately 20,000 sheets per hour;[179] obviously, the machine was a far different product from the axe, buzz saw, and propeller envisioned by the *Campo* court.[180] Yet, the danger apparently was obvious and, consequently, the lower court, applying the latent-patent test, held for the defendant.[181] The court of appeals reversed, commencing its opinion with the statement that "[t]he time has come to depart from the patent danger rule enunciated in *Campo*,"[182] and it then proceeded to discuss in detail the harshness and inequities caused by the *Campo* doctrine.[183] The court stressed that in this modern age of complex, sophisticated, and mysterious products, responsibility must be placed upon the manufacturer to make its products safe, since it is in the best position to recognize and cure defects.[184] Because of this policy consideration, certain factors within the balancing approach, in particular the foreseeability of danger by the manufacturer[185] and the availability of

175. *Id.* at 759. The *Dorsey* court stated that, because of products such as knives, "to preclude absurd results the obviousness of the danger must constitute but *one* of the factors that determines whether the danger is unreasonable." *Id.* (emphasis by the court).

176. *See, e.g.*, Luque v. McLean, 8 Cal. 3d 136, 144-46, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972) (plaintiff's hand slipped into exposed blade of lawn mover and court held obviousness of danger should be considered only in relation to affirmative defense of assumption of risk).

177. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

178. *Id.* at 380, 348 N.E.2d at 573, 384 N.Y.S.2d at 117.

179. *Id.* at 379, 348 N.E.2d at 573, 384 N.Y.S.2d at 117.

180. See note 68 *supra* and accompanying text.

181. 39 N.Y.2d at 381, 348 N.E.2d at 574, 384 N.Y.S.2d at 118.

182. *Id.* at 379, 348 N.E.2d at 573, 384 N.Y.S.2d at 117.

183. *Id.* at 382-86, 348 N.E.2d at 575-77, 384 N.Y.S.2d at 119-21.

184. *Id.* The court stated that "in our highly complex and technological society, we fall victim to the manufacturer who holds himself out as an expert in his field."

185. *Id.* at 385-86, 348 N.E.2d at 577, 384 N.Y.S.2d at 121. The court stated:

> To this end, we hold that a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone

devices or designs which could have made the product safe,[186] were given special emphasis by the *Micallef* court. The obviousness factor, on the other hand, was available to the defendant for proof of contributory negligence or assumption of risk.[187]

The balancing approach adopted in *Dorsey*, *Micallef*, and several other recent decisions[188] is a viable theory. It places a heavy burden on the manufacturer, as an expert and the one most able to prevent injuries, to make its products safe for foreseeable uses,[189] but the approach also takes into account the non-availability of adequate safety devices and the sufficiency of warnings and instructions in proper cases.[190] By retaining obviousness as one factor, the balancing approach ensures that manufacturers of common, simple products with well-understood dangers will not be made insurers of their products.[191] The approach basically recognizes that the issue whether a product is unreasonably dangerous cannot be resolved by reference to any one factor such as obviousness; rather the issue must be resolved by considering all relevant factors, with recognition of the fact that the manufacturer is in a special position of responsibility because of its ability to remedy defects and

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who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.

Id.

186. *Id.* at 386, 348 N.E.2d at 578, 384 N.Y.S.2d at 121. The court stated that "[a]lso relevant, but by no means exclusive, in determining whether a manufacturer exercised reasonable skill and knowledge concerning the design of the product is whether he kept abreast of recent scientific developments and the extent to which any tests were conducted to ascertain the dangers of the product." *Id.*

187. *Id.* at 387, 348 N.E.2d at 578, 384 N.Y.S.2d at 122. The court indicated that obviousness was still relevant in relation to the affirmative defenses of contributory negligence and assumption of risk, stating:

> That does not mean, however, that the obviousness of the danger as a factor in the ultimate injury is thereby eliminated, for it must be remembered that in actions for negligent design, the ordinary rules of negligence apply. Rather, the openness and obviousness of the danger should be available to the defendant on the issue of whether plaintiff exercised that degree of reasonable care as was required under the circumstances.

Id.

188. See note 159 *supra*.

189. This result furthers the objectives underlying the development of modern products liability law. *See* 86 HARV. L. REV. 923 (1973); note 8 *supra*.

190. *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 348 N.E.2d 571, 578, 384 N.Y.S.2d 115, 121 (1976) (expense and feasibility of proposed safety devices is relevant defensive matter for defendant); note 170 *supra* and accompanying text.

191. See notes 175-76 *supra* and accompanying text. Because of the requirement that the risk be unreasonable, *Micallef* and similar cases avoid placing the manufacturer in the position of an insurer or of requiring accident-proof products. *See* Dorsey v. Yoder Co., 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 348 N.E.2d 571, 578, 384 N.Y.S.2d 115, 121-22 (1976).

spread the costs of injuries. The approach also complements the important policies underlying comparative fault laws, for if the danger is obvious to the user, that fact is relevant primarily in relation to the affirmative defenses of contributory negligence and assumption of risk and those defenses only operate to reduce recovery in comparative fault jurisdictions. Thus, the balancing approach requires a standard of care for manufacturers commensurate with their unique capability to make their products safe, yet reduces recovery for plaintiffs who voluntarily and unreasonably use products when aware of the dangers those products create.

If the Minnesota Supreme Court in *Halvorson* had utilized the balancing approach, it could have reached the same result as would have been reached under the *Campo* doctrine.[192] The manufacturer in *Halvorson* had warned of the potential danger if its product was used near high voltage power lines, the product was socially useful, its dangers were generally appreciated by the users of the product, and apparently it could not reasonably have been made more safe.[193] Under the balancing approach, these facts are all indications that the product was not unreasonably dangerous and therefore not defective. Indeed, the court emphasized most of these facts and appeared to be applying a balancing type of approach. Consequently, the court's reliance on *Campo* was unnecessary.

V. CONCLUSION

The latent-patent rule, as apparently adopted by the Minnesota Supreme Court in *Halvorson,* is an outmoded legal doctrine which conflicts with several important, well-reasoned policies endorsed by the Minnesota court and legislature. By making obviousness a bar to recovery, the latent-patent rule engulfs and renders largely useless the assumption of risk defense, thereby frustrating the loss distribution scheme of Minnesota's comparative negligence statute. Rejection of the latent-patent rule and adoption of the more equitable balancing approach would eliminate the harsh consequences of the *Campo* doctrine and ensure that manufacturers are held responsible for product dangers that can be foreseen and corrected. The clearest and best reasoned application of the balancing approach is found in *Dorsey* and *Micallef,* and these cases would provide a more rational foundation for the treatment of obviousness in Minnesota products liability law than does the *Campo* doctrine.

192. See note 170 *supra* and accompanying text.
193. ___ Minn. at ___, 240 N.W.2d at 308.